

## **The Myth of Helms-Burton: Why the President Can Change the Rules Governing U.S. Cuba Policy (and how he might loosen travel restrictions)**

*by Jake Colvin*

Widespread speculation that the Obama administration will loosen restrictions on the ability of American citizens to travel to Cuba has renewed questions about the authority of the president to alter Cuba policy.

Some have argued that, even if President Obama is inclined to change policy, Congress has tied his hands by passing legislation on Cuba. While Congress has a significant role to play in ending the attack on the right of American citizens to travel freely to Cuba, the administration's hands are far from tied when it comes to shaping policy.

### **Current executive branch discretion**

In codifying the embargo, “including all restrictions under part 515 of title 31,” Congress captured in Helms-Burton the president’s discretion to change the restrictions. This licensing authority is stated throughout the Cuban Assets Control Regulations (CACR). Section 201(a) and (b) and Section 204(a) specify that transactions involving Cuba are prohibited “except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, rulings, instructions, licenses, or otherwise.” Section 202 indicates that securities transactions with Cuban nationals are prohibited “unless authorized by a license expressly referring to this section.” The regulations restrict holding blocked property “except ... as authorized by the Secretary of the Treasury or his delegate by specific license.”

Both Clinton and Bush utilized this discretion to modify the Cuba sanctions regulations following the passage of the Libertad Act in 1996. After Pope John Paul II visited Cuba in January 1998, the Clinton administration changed the rules to permit Cuban Americans to send money to relatives in Cuba and to allow direct flights between the United States and Havana. On January 5, 1999, Clinton announced that his administration would expand remittances to Cuba; increase people-to-people exchanges with Cuban academics, athletes, and scientists; and allow sales of agricultural products to independent groups in Cuba.

In 2008, the Bush administration announced and published regulations to permit Cuban Americans to distribute cell phones to relatives on the island. In explaining the policy, NSC Senior Director for Western Hemisphere Affairs Dan Fisk said, “in this case the State Department and the Department of Commerce will work together to change the regulatory structure. It’s a Federal Register [notice] ... Most of the embargo is actually contained in federal regulations.” (Oddly, the Bush administration used its discretion to exempt U.S.-origin electronics on the Commerce Control List, which are specially controlled by the Department of Commerce for reasons of anti-terrorism, to a country that the State Department says is a sponsor of terrorism.)

## **The Trade Sanctions Reform and Export Enhancement Act of 2000**

Ironically, the only piece of legislation that may restrict executive authority is the one that was designed to loosen the trade embargo. In 2000, a bipartisan group of lawmakers helped enact the Trade Sanctions Reform and Export Enhancement Act (TSRA). The law exempts exports of food, medicine, medical products, and agricultural products from U.S. sanctions. It is because of TSRA that U.S. farmers can sell lentils and poultry to Cuba and medicine and defibrillators to Sudan and the Palestinian Authority.

In exchange for exempting humanitarian trade from the embargo, pro-embargo members of Congress championed a provision that prohibits the executive branch from licensing “travel to, from, or within Cuba for tourist activities.” The president may only license travel under a dozen categories of purposeful travel, which are contained in Section 515.560 of the Cuban Assets Control Regulations. They are:

- (1) Family visits;
- (2) Official business of the U.S. government, foreign governments, and certain intergovernmental organizations;
- (3) Journalistic activity;
- (4) Professional research;
- (5) Educational activities;
- (6) Religious activities;
- (7) Public performances, clinics, workshops, athletic and other competitions, and exhibitions;
- (8) Support for the Cuban people;
- (9) Humanitarian projects (specific licenses);
- (10) Activities of private foundations or research or educational institutes;
- (11) Exportation, importation, or transmission of information or informational materials; and
- (12) Certain export and marketing transactions.

As a result of TSRA, one of the most logical steps the president might wish to take – lifting the travel ban – likely would require an act of Congress.

### **How President Obama Can Expand Travel to Cuba**

At the same time, the president retains a great deal of discretion within these categories to increase people-to-people contact with Cuba. First, the administration can loosen the qualifications under the various categories of travel. For example, the Bush administration imposed a condition that, in order to travel to Cuba under an academic license, a student had to be enrolled in a degree program and engaged in study in Cuba that was no shorter than 10 weeks. President Bush also prohibited visits, which were allowed under Clinton administration policies, by individuals to Cuba when a family member is in Cuba pursuant to an OFAC license, except in “exigent” circumstances and only “after consultation with the Department of State, in true emergent situations, such as serious illness accompanied by an inability to travel.”

Loosening these and other rules could have a significant impact on travel to Cuba.

Another change that could have a significant impact would be to permit more travel to Cuba via general licenses rather than requiring specific license applications. The administration currently relies

heavily on “specific licenses,” which requires the Treasury Department to approve individual applications to travel to Cuba in many cases.

The administration should ease the burden on the Treasury Department by mandating general licensing of authorized categories of travel to Cuba while redeploying resources internally to focus on the department’s urgent priorities of tracking terrorist financing.

Loosening travel restrictions would be a welcome step in the right direction that would create additional momentum for Congress to end the entire travel ban.

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